




FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
Acting General Counsel

FROM: Office of the Commission Secretary 

DATE: July 27, 2001

SUBJECT: Statement of Reasons for MURs 5110 and 5162

Attached is a copy of the Statement of Reasons for
MURs 5110 and 5162 signed by Chairman Danny L. McDonald,
Vice Chairman David M. Mason, Commissioner Karl J. Sandstrom,
Commissioner Bradley A. Smith, and Commissioner Darryl R. Wold.
This was received in the Commission Secretary's Office on Thursday,
July 26, 2001 at 4:39 p.m.

cc: Vincent J. Convery, Jr.
Information Division
Press Office
Public Disclosure

Attachment

21.04.405.1539



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In re KBHK Channel 45,
ABC News, *et al.*

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MURs 5110, 5162

STATEMENT OF REASONS

On April 17, 2001, the Commission voted unanimously to find no reason to believe the Respondents in MURs 5110 and 5162 violated the Federal Election Campaign Act (FECA) as a result of the activities described in those complaints.¹ The complaints cited broadcasts by media entities within their press function, which places the Respondents beyond the purview of the FECA.

MUR 5110

In MUR 5110, the Complainant alleged that a local television station aired a program by the Christian Broadcasting Network (CBN) that was essentially an advertisement both because of its biased message and because CBN purchased air time for the broadcast from KBHK Channel 45, apparently a local San Francisco area television station. The Complainant did not allege any specific violation of the FECA ("this advertiser [should] be required to constantly identify itself as advertisement, in the manner of newspaper ads that simulate news coverage"), but, perhaps, of something more akin to a regulation of the Federal Communications Commission.

MUR 5162

In MUR 5162, the Complainant alleged that ABC, CBS and CNN News broadcast information designed to affect the outcome of the November 7, 2000 election by relaying voting results prior to the polls closing on the west coast.

Analysis and Conclusions

The FECA excludes from the definition of "expenditure" "any news story, commentary, or editorial distributed through the facilities of any broadcasting station,

¹ The General Counsel had recommended that these matters be dismissed as not warranting the further expenditure of resources relative to other matters pending before the Commission.

21.04.45.154.1

newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate." 2 U.S.C. § 431(9)(B)(i); *see also* 11 CFR 100.7(b)(2) and 100.8(b)(2) (terms "contribution" and "expenditure," respectively, do not include "[a]ny cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate . . .").

When considering complaints against media entities, courts have insisted that the Commission restrict its initial inquiry to whether the media exemption applies. *Readers Digest Ass'n, Inc. v. FEC*, 509 F. Supp. 1210, 1214 (S.D. N.Y. 1981); *FEC v. Phillips Publishing, Inc.*, 517 F. Supp. 1308, 1312-13 (D. D.C. 1981). Only after concluding that the media exemption does not apply may the Commission commence an inquiry under its otherwise applicable "in connection with" (2 U.S.C. § 441b(a)) or "purpose of influencing" (2 U.S.C. § 431(8)(A), (9)(A)) standards.

This two-stage process was mandated because the media exemption represents a fundamental limitation on the jurisdiction of this agency, and even an investigation of publishers can trespass on the First Amendment:

[F]reedom of the press is substantially eroded by investigation of the press, even if legal action is not taken following the investigation. Those concerns are particularly acute where a governmental entity is investigating the press in connection with the dissemination of political matter. These factors support the interpretation of the statutory exemption as barring even investigation of press activities which fall within the exemption.

Reader's Digest, 509 F. Supp. at 1214.

In determining whether the media exemption is applicable, the courts have held two questions to be relevant: whether the entity is owned or operated by a political party, candidate or political committee, and whether the entity is operating within its "legitimate press function." *Id.*; *see also Phillips Publishing*, 517 F. Supp. at 1313.

There is no doubt that none of the media Respondents is owned or controlled by any candidate, political party or political committee.

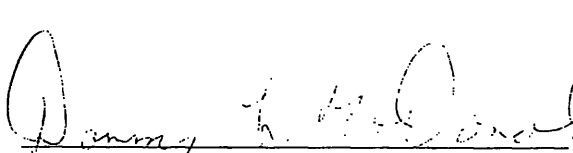
The complaints cite only the broadcasts of the Respondent entities, leading to a *per se* conclusion that the activities complained of fall within the statutory exemption of any "news story, editorial or commentary" and within the judicially-described "legitimate press function." The content of broadcast is irrelevant to the determination of whether the media entity is exercising its valid press function. *Reader's Digest*, 509 F. Supp. at 1216.

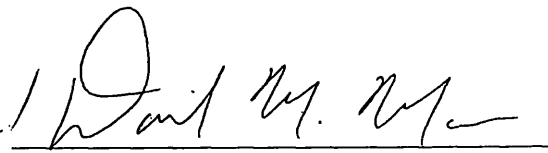
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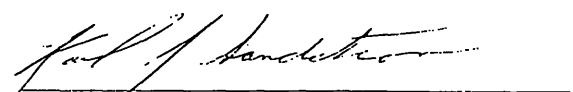
This straightforward reading of the media exemption is consistent with our unanimous treatment of it in MUR 4863. There, the complainant alleged that a radio talk show host "*expressly or implicitly advocated* the reelection of Senator D'Amato and/or the defeat of Representative Schumer. He may have also replayed portions of D'Amato advertisements and commented on them." First General Counsel's Report at 8-9. Nonetheless, the Commission concluded that the "commentary apparently broadcast on the [radio talk show] would appear to be squarely within the 'legitimate press function' of [the radio station]." *Id.* at 9. Moreover, this conclusion was "not altered by the possibility that D'Amato advertisements may have been rebroadcast . . . within the context of [the talk show host's] commentary on them." *Id.* (citing AO 1996-48). This analysis is also consonant with MUR 3624, in which the Commission determined that a radio station exercised its press function where it was alleged to have effectively broadcast unpaid advertising for Bush/Quayle via airing of the Rush Limbaugh program, which had endorsed Bush/Quayle. *See also* MURs 4946 (CBS News) and 4689 (Salem Radio Network).


Thus, in MUR 5110, the allegation that CBN's broadcast on KBHK was, because of bias, effectively an advertisement is simply insufficient to provide reason to believe that any violation of the FECA has occurred. Whether reporting and commentary are "balanced" or "fair" has no bearing on whether the activities are protected by the media exemption. Nor does the purchase of air time by a broadcaster from another broadcaster remove a news program from under the press exemption umbrella. Likewise, with respect to MUR 5162, the content of a news broadcast, even if it were intended to influence an election (in this case, by suppressing voter turnout on the west coast) is beyond the jurisdiction of this agency.

July 24, 2001


Danny L. McDonald, Chairman


David M. Mason, Vice Chairman


Karl J. Sandstrom, Commissioner


Bradley A. Smith, Commissioner


Darryl R. Wold, Commissioner